No. 94-1837

In the Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

TOM GALLAGHER, Insurance Commissioner of the State of Florida, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CONSUMER BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, FLORIDA BANKERS ASSOCIATION, ARKANSAS BANKERS ASSOCIATION, GEORGIA BANKERS ASSOCIATION, MASSACHUSETTS BANKERS ASSOCIATION, MICHIGAN BANKERS ASSOCIATION, NEW MEXICO BANKERS ASSOCIATION, OHIO BANKERS ASSOCIATION, PENNSYLVANIA BANKERS ASSOCIATION, TENNESSEE BANKERS ASSOCIATION, VERMONT BANKERS ASSOCIATION, WESTERN INDEPENDENT BANKERS, FIRST INTERSTATE BANCORP AND THE HUNTINGTON NATIONAL BANK IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari. Consent to file this brief has been obtained from counsel for petitioner Barnett Bank of Marion County, N.A., and from counsel for respondents Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and Florida Association of Insurance Agents.* However, counsel for respondent Insurance Commissioner of the State of Florida has declined to consent.

The petition seeks review of the determination by the United States Court of Appeals for the Eleventh Circuit

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* Correspondence reflecting the consent of these parties has been filed with the Clerk of the Court.

that Florida may prohibit national banks from engaging in an activity expressly authorized by Congress—selling insurance in communities with less than 5000 inhabitants. The court of appeals' decision threatens the federally authorized ability of national banks to compete in the financial services marketplace and upsets the congressionally crafted balance between federal and state authority over national banks.

Amici have a direct interest in ensuring that national banks are permitted to continue to engage in sales of insurance to the full extent authorized by federal law. As more fully described below, *amici* are national, regional and state banking associations whose members include banks and savings associations throughout the United States. *Amici* also include financial institutions that directly or through affiliated institutions engage in the sale of insurance in small towns.

Three national and regional associations join the attached brief on behalf of their members. *Consumer Bankers Association, America's Community Bankers,* and *Western Independent Bankers* represent numerous national banks that engage in insurance activities in small towns as authorized by Congress. These associations and their constituent members have a direct interest in preserving these activities from restrictive and anti-competitive state laws. Other members of these associations are prevented from conducting congressionally authorized insurance activities because the laws of the states in which they operate purport to restrict those activities. Descriptions of these associations follow:

The *Consumer Bankers Association* (CBA) was founded in 1919 to provide a progressive voice for the retail banking community. CBA represents over 750 federally insured banks and thrift institutions that hold more than 80% of all consumer deposits and more than 70% of all consumer credit held by federally insured depository institutions in the United States.

America's Community Bankers (ACB) is the national trade association for over 1800 savings and community financial institutions, serving communities in every state. Members are federally and state chartered, stock and mutual in ownership, and FDIC-insured. The industry members that ACB represents have more than $1 trillion in assets, 270,000 employees and 16,000 offices. Many of ACB's member banks have long provided the public with insurance products and services through related entities under a variety of corporate structures.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming, as well as American Samoa and Guam. WIB's members account for more than $34 billion in banking assets.

Ten statewide banking associations also join in the attached brief. Each state represented by these associations has enacted legislation purporting to prohibit or severely proscribe the ability of banks, including national banks, to market insurance products. Each state association is described below:

Florida Bankers Association (FBA) is the principal organization representing commercial banks in Florida. FBA's 321 members comprise 88% of the banks in the state, and these members hold 96% of the state's bank deposits. Legislation enacted by the State of Florida purporting to prohibit national banks from marketing insurance products in small towns is directly at issue in this case.

Arkansas Bankers Association has represented Arkansas banks and bank holding companies for 104 years. The primary objective of the Arkansas Bankers Association is to provide a forum for the financial community to address

issues of state and national importance to the business of banking so as to promote a positive banking environment for member banks and customers.

Georgia Bankers Association (GBA) is the statewide association representing commercial banks in the State of Georgia. GBA's members collectively account for virtually all of the banking assets in the state.

Massachusetts Bankers Association is a statewide association representing 192 banks and savings associations in the Commonwealth of Massachusetts. Its members account for $150 billion in banking assets.

Michigan Bankers Association has represented Michigan commercial banks and bank holding companies for over 100 years. It represents approximately 200 commercial banks in Michigan, which collectively account for virtually all of the banking assets in the state.

New Mexico Bankers Association (NMBA) is the principal state trade association for the banking community in New Mexico. Its membership consists of 69 banks and savings institutions, which collectively account for over 90% of banking assets in New Mexico.

Ohio Bankers Association is the principal state trade association representing virtually all of the commercial banks in Ohio. Its members range in size from small community banks to large regional institutions.

Pennsylvania Bankers Association (PBA) is the trade association representing approximately 250 commercial and savings banks in the commonwealth of Pennsylvania. PBA's members hold 99% of the commercial banking assets in Pennsylvania.

Tennessee Bankers Association (TBA) is the principal trade association for commercial banks, savings banks, savings and loans and trust companies in Tennessee. All 249 state and federally chartered banks and trust companies and all 27 state and federally chartered savings institutions in Tennessee are members of TBA.

Vermont Bankers Association (VBA) represents 28 commercial banks and savings associations in Vermont. VBA provides legislative, regulatory and educational services to its members.

In addition to the above-named banking associations, *First Interstate Bancorp and The Huntington National Bank* join the attached brief as *amici*. These institutions have a direct interest in exercising the full range of powers granted to national banks by Congress.

First Interstate Bancorp is headquarted in Los Angeles, California, and operates 14 subsidiary banks with 1167 branches in 13 western States. It has total assets of $56.9 billion.

The Huntington National Bank is a national bank headquartered in Columbus, Ohio, with banking offices throughout the state of Ohio. It is the principal banking subsidiary of Huntington Bancshares Incorporated, a $19.4 billion bank holding company with bank and non-bank subsidiaries located in several mid-western states and Florida.

For the foregoing reasons, the motion by *amici* for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITIONER FILED BY *AMICI CURIAE* CONSUMER BANKERS ASSOCIATION, *ET AL.*

National banks are instrumentalities of federal law, governed by a comprehensive federal regulatory scheme. Congress initiated the modern national banking system in the National Bank Acts of 1863 and 1864, which, *inter alia*, granted national banks the right to engage in the "business of banking" and such other activities as are incidental thereto. 12 U.S.C. § 24 Seventh (1994). Congress empowered the Comptroller of the Currency, a bureau of the United States Department of the Treasury, to charter national banks and regulate their activities. National banks derive their powers exclusively from the National Bank Act and other federal statutes.

This case raises important issues concerning whether a state may deny national banks their authority, expressly granted by Congress, to broker and sell insurance products. The Court of Appeals for the Eleventh Circuit ruled that Florida may prohibit petitioner Barnett Bank from selling insurance products, even though 12 U.S.C. § 92 authorizes the bank to do so. The court of appeals' decision threatens the federally endowed authority of national banks to compete in the financial services marketplace and upsets the congressionally crafted balance between federal and state authority over national banks. Moreover, the decision conflicts with the decisions of other courts. Because the decision has far reaching, adverse ramifications for the banking industry and for consumers, *amici* join petitioner in urging this Court to review and reverse the decision of the court of appeals, and to so restore to national banks their power to engage in the full range of activities permitted by Congress and the Comptroller of the Currency.

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are detailed in the accompanying Motion. Briefly, *amici* are national and state banking associations whose members include banks and savings associations throughout the United States, as well as certain financial institutions which have or are national bank subsidiaries. *Amici* have a direct and substantial interest in ensuring that national banks are permitted to continue to engage in the sale of insurance products to the full extent authorized by federal law. The decision of the court of appeals below threatens this interest.

REASONS FOR GRANTING THE WRIT

In the early days of the Republic, this Court ruled that pursuant to "the great powers" of the Constitution, including the power to borrow money and the power to regulate commerce, Congress may charter banks. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Absent express authorization from the Congress, "the States have not power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436. State exercise of concurrent regulatory authority over the activities of national banks is forbidden if the state law is "in conflict with some Act of Congress, or . . . tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation." [1]

This case poses the significant question whether states may proscribe national banks from executing a power expressly granted by Congress—the power to broker and sell insurance. In 1916 Congress provided that any national bank doing business in a location with 5000 or fewer residents may "act as the agent for any . . . insurance company . . . by soliciting and selling insurance and collecting premiums on policies" issued by insurance companies. Act of Sept. 7, 1916, c. 461, 39 Stat. 753 (current version at 12 U.S.C. § 92 (1994)) ("Section 92").[2] Congress granted this statutory power to provide

[1] *Waite v. Dowley*, 94 U.S. 527, 533 (1877). This Court has articulated this basic formulation numerous times. *See, e.g., Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944).

[2] This Court recently resolved a controversy over the continuing vitality of Section 92 by determining that the provision has not been repealed. *United States Nat'l Bank v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993).

consumers convenient access to insurance through local banks, particularly in small and underserved communities, as well as to provide an additional source of revenue for banks. *Independent Ins. Agents of Am. v. Ludwig*, 997 F.2d 958, 960 (D.C. Cir. 1993) (citing 53 Cong. Rec. S11,001 (1916) (letter from Comptroller of the Currency J. Skelton Williams)).[3] Today Section 92 promotes robust competition in the sale of insurance policies by authorizing national banks to act as insurance agents in small towns.

Florida and several other states, however, have enacted so-called anti-affiliation laws that prohibit national banks from selling insurance products, *see* Petition of Barnett Bank ("Petition"), at 6 & n.1, and have thereby thwarted the congressional purpose underlying Section 92. The Florida law at issue in this case provides that "[n]o insurance agent . . . who is associated with . . . a financial institution shall engage in insurance activities." Fla. Stat. Ann. § 626.988(2) (West 1994) (quoted in full at page 4 of the Petition). Under traditional preemption analysis, Section 92 would preempt the squarely conflicting Florida statute. *E.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (power implicit under the federal banking laws for banks to use word "savings" in advertising preempts New York law prohibiting use of that term); *Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) (California law prohibiting due-on-sale clause in loan instruments preempted by federal law permitting same).

The court of appeals held in this case, however, that Florida's anti-affiliation law escapes preemption by virtue

[3] Comptroller Williams advised the Senate Banking and Currency Committee that giving national banks doing business in small towns the power to act as general insurance agents would provide banks with "additional sources of revenue to put them in a position where they could better compete with local State banks and trust companies." 53 Cong. Rec. S11,001 (cited in *Ludwig*, 997 F.2d at 960).

of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), which provides that federal law does not impair state laws that regulate the business of insurance unless the federal law "specifically relates to the business of insurance."[4] Congress enacted the McCarran-Ferguson Act after this Court ruled that the Sherman Act extends to the business of insurance and that such coverage is authorized under the Commerce Clause. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).[5] Congress' purpose was to ensure that "*silence* on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation" of the insurance business by the states. 15 U.S.C. § 1011 (1988) (emphasis added). Section 2(b) accordingly provides that federal laws *will* preempt state insurance regulations if the former "specifically relate[] to the business of insurance." 15 U.S.C. § 1012(b). Given Congress' specific concerns that congressional *silence* should not *by mere implication* disrupt state regulation of the business of insurance,[6] the McCarran-Ferguson Act does not save the Florida statute from preemption since the federal law at issue here, Section 92, is far from silent on the subject. Nevertheless, agreeing with Florida's Insurance Commissioner and allied insurance agent interests,[7] the court of

[4] "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." *Id.*

[5] Before 1944 it was generally believed that the issuance of an insurance contract was not a transaction in "commerce." *See, e.g., Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

[6] *Infra* at 11-13 and n.11.

[7] The Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Association of Insurance Agents intervened in the proceedings below. As a result of the court of appeals' decision, members of these associations no longer face competition from national banks in the sale of insur-

appeals held that petitioner Barnett Bank, a national banking organization, could not carry out the powers explicitly granted to it by federal law to market insurance products.

This Court should review and reverse the decision below. First, the erroneous decision by the court of appeals, in conflict with other recent decisions,[8] anticompetitively curtails the ability of national banks to engage in an activity explicitly authorized by Congress, to the significant detriment of consumers and the market. Second, the decision below improperly reconciles two important federal statutory schemes—the National Bank Act, including amendments by the Federal Reserve Act, and the McCarran-Ferguson Act. Finally, this case raises significant questions about the proper interpretation of the McCarran-Ferguson Act.

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ance products. *See Interstate Banking and Insurance Activities of National Banks: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 95 (Oct. 5 and Nov. 3, 1993) (statement of Robert J. Hunter, President of the National Insurance Consumer Organization) ("Banks are a logical source of insurance. Sales outlets in banks would be convenient for consumers and should be extremely efficient points for sale. The incredible reaction of insurance agents against bank entry is due in the main to their inefficiency and high costs.").

[8] The Sixth Circuit recently held that Section 92 preempts a Kentucky law purporting to limit the power of national banks to sell insurance products. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (Kentucky law not enacted for purpose of regulating business of insurance); Pet. App. 39a-64a. In another recent case, the Louisiana state courts ruled that Section 92 does not preempt a state law forbidding national banks in small towns from selling insurance. *First Advantage Ins., Inc. v. Green*, 652 So. 2d 562 (La. Ct. App.), *cert. denied*, 654 So. 2d 331 (La. 1995), *pet. for cert. filed*, Case No. 94-2130 (U.S. Sup. Ct., June 27, 1995). *Amici* expect that, as in the *First Advantage* case, a petition for review by this Court of the *Owensboro* decision will soon be filed. *See* Petition at 17.

I. THE DECISION BELOW THWARTS THE EXPRESS CONGRESSIONAL AUTHORIZATION FOR NATIONAL BANKS TO ENGAGE IN INSURANCE ACTIVITIES AND WILL SEVERELY IMPAIR COMPETITION.

The court of appeals' error deprives consumers, banks, and insurance companies alike of the benefits intended by Congress to be provided through federally authorized sales by national banks of insurance and related products. As recently acknowledged by this Court, ongoing changes in the financial services industry among products and distribution systems have resulted in heightened competition among banks and other nonbank purveyors of financial products and services. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995). The erroneous ruling of the appeals court in this case would arbitrarily restrain such natural market developments and deny consumers the benefits thereof, by reinforcing artificial state law barriers in a manner not contemplated by or consistent with the relevant federal laws.

The decision below would largely restrict consumer options in the purchase of insurance products to less convenient and more costly sources. According to a study by the Federal Reserve Bank of Boston, bank participation in the insurance market can "keep costs down and increase customer convenience." Steven D. Felgran, *Banks as Insurance Agencies: Legal Constraints and Competitive Advances*, New Eng. Econ. Rev., Sept.-Oct. 1985, at 34, 37. More recently, the General Accounting Office likewise concluded that participation by banks in this market reduces consumers' costs of purchasing insurance. *See Interstate Banking and Insurance Activities of National Banks: Hearings Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 103d Cong., 1st Sess. 96 (1993) ("House Hearings") (citing United States General Accounting Office, Report to the Chairman, Comm. on Small Business, House of Representa-

tives, *Bank Powers—Issues Relating to Banks Selling Insurance* (1990) ("GAO Report")). Moreover, demonstrating the significant economic consequences of the issues presented here, a study by the Consumer Federation of America concluded that full-fledged bank participation in life insurance sales will save consumers five to ten *billion* dollars annually. House Hearings at 95; *see also id.* at 125 (consumers have benefitted from the "market presence of banks" in the sale of insurance); *id.* at 198 (statement of Frank N. Newman, Under Secretary of the Treasury) (bank sales of insurance offer consumers greater convenience and lower prices, which "may be most important to consumers and small businesses in remote areas or low-income communities"). Without citing any evidence that Congress intended national bank powers in this arena to yield to the contrary wishes of the states, the court of appeals' decision would remove national banks in its jurisdiction from this market to the detriment of consumers.

At the same time, bank participation in the distribution of insurance enhances the safety and soundness of the banking system. *E.g.*, GAO Report at 5 (insurance sales commissions could "strengthen safety and soundness and protect against bank failures"); *see also* House Hearings at 96-97; *id.* at 47 (statement of Eugene A. Ludwig, Comptroller of the Currency) ("The sale of insurance poses very little risk to national banks."). As the Comptroller has testified, if banks are to continue to play their "essential roles" in the economy and to remain financially strong, they "must be given a fair opportunity to compete with other providers of financial services." *Id.* at 47. Particularly in small towns, banks "serve as poles of economic development." *Id.*

The permissible range of national bank powers is for Congress to delineate, and this case does not call upon the Court to expand or circumscribe bank powers but rather to give effect to those powers expressly provided by Con-

gress. Congress long ago made the cogent determination: banks doing business in small towns are authorized—for the benefit of consumers and financial institutions—to act as agents for insurance companies in sales of their products. 12 U.S.C. § 92. The decision of the court of appeals to defer to contrary state law thwarts this congressional policy and should be reversed by this Court.

II. THIS COURT SHOULD ADDRESS WHETHER ACTIVITIES SPECIFICALLY AUTHORIZED FOR NATIONAL BANKS BY THE FEDERAL BANKING STATUTES MAY BE PROHIBITED BY THE STATES PURSUANT TO GENERAL LANGUAGE IN THE McCARRAN-FERGUSON ACT.

This case presents the important question whether Congress, in enacting the McCarran-Ferguson Act in 1945, intended to authorize the states to nullify express powers that Congress granted to national banks nearly three decades earlier. Guidance by this Court is needed, both for the lower courts and the banking industry, regarding the scope of state authority over national bank participation in insurance activities.

1. The powers of national banks are in the first instance for Congress and the Comptroller of the Currency to determine. *NationsBank*, 115 S. Ct. at 813-14.[9] As a general proposition, "any attempt by a State to define [national banks'] duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank." *First Nat'l Bank v. California*, 262 U.S. 366 (1923). As this Court made clear nearly a century ago:

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[9] Indeed, the Comptroller has discretion to authorize other financial and related activities for national banks beyond those expressly enumerated by the federal banking statutes. *Id.* at 814 n.2 (discussing 12 U.S.C. § 24 Seventh).

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896) (holding that while national banks may remain subject to "general and undiscriminating state laws," federal law governing distribution of assets of insolvent national bank preempts contrary New York law).

Congress has explicitly subjugated certain aspects of banking operations, by both national and state chartered banks, to state control. Bank branching is a notable example: the McFadden Act authorized national banks to establish branches to the same extent that state laws permit state chartered banks to do so. 12 U.S.C. § 36 (1994). Congress has similarly provided that state laws limiting interest rates apply to national banks located in those states. 12 U.S.C. § 85 (1994). Again, Section 11(k) of the Federal Reserve Act, which was enacted only three years before the small town insurance provision in Section 92, authorizes national banks to act "as trustee, executor, administrator, or registrar of stock and bonds," so long as such authorization "is not in contravention of State or local law." 12 U.S.C. § 92a (1994).[10]

[10] *See also, e.g.*, 12 U.S.C. § 24 Eighth (1994) (permitting charitable contributions by national banks unless state law prohibits such contributions by state banking institutions); and 12 U.S.C. § 90 (1994) (national banks permitted to give security for deposits by state or political subdivisions to the extent authorized by state law).

Thus, where Congress intends to permit state law limitations on federally created powers, it does so expressly and ought not to be thought to do so by implication. *See Franklin Nat'l Bank*, 347 U.S. at 378 & n.7 (no finding of congressional intent to subject a "phase of national banking to local restrictions" by implication, where Congress had done so "by express limitation in several other instances").

Section 92 grants specific insurance agency powers to national banks, but it acknowledges *no* authority in the states to limit those powers. Indeed, the specific language of the statute grants to the Comptroller the authority to regulate the agency activities of national banks, while leaving to the states the licensing of insurance companies. Given that Congress has elsewhere employed express statutory language where it wishes to permit state regulation of the activities of national banks, Congress should not be presumed to have upset the balance between federal and state authority through the general language of Section 2(b) of the McCarran-Ferguson Act. This important point should be addressed by this Court.

2. In addition to the conflict in the circuits noted above, *see supra* footnote 8, the courts of appeals have reached conflicting conclusions as to whether the McCarran-Ferguson Act applies to national banks. The United States Court of Appeals for the Eighth Circuit has ruled that that Act "was not directed at the activities of national banks" at all. *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775, 779 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). That court held that Arkansas could not prohibit a national bank from entering into debt cancellation contracts. The court explicitly rejected Arkansas' invocation of the McCarran-Ferguson Act, reasoning that the Act had been passed only to

preserve traditional state regulation of insurance companies and to provide insurers with a partial exemption from the antitrust laws in reaction to this Court's decision in *South-Eastern Underwriters*. The *Taylor* ruling underscored that, well before *South-Eastern Underwriters*, "regulation of national banks was within the exclusive domain of the federal government." *Id.* at 780. This fact, the court reasoned, "strongly indicates" that Congress did not intend to permit state power over insurance activities to "encompass lawful activities of national banks." *Id.*; *see also United Serv. Automobile Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (state anti-affiliation law not within scope of McCarron-Ferguson because, *inter alia*, "banks are not entities within the insurance industry"), *cert. denied*, 479 U.S. 1031 (1987).

In the immediate case, by contrast, the court of appeals exalted the general language of the McCarran-Ferguson Act over the detailed framework of the national banking statutes. Congress passed the McCarran-Ferguson Act to ensure that federal statutes did not by *mere implication* interfere with the state regulation of the business of insurance.[11] Here, the court of appeals conversely applied

[11] During Senate floor consideration of the McCarran-Ferguson legislation, Senator Ferguson stated that the "specifically relates to" language of Section 2(b) was to ensure that federal legislation have preemptive force only if it does more than relate to interstate commerce in general:

> What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically *with reference to insurance* in enacting the law.

91 Cong. Rec. 1487 (1945) (emphasis added), *quoted in United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2211 n.7 (1993). What Congress sought to assure was that "no existing law and no future law should, *by mere implication*, be applied to the business of insurance" simply because the law related to commerce. *Id.* (statement of Sen. O'Mahoney) (emphasis added). Senator Ferguson confirmed the accuracy of this statement. *Id.*

the general language of Section 2(b) to deprive national banks of express statutory authority to market insurance products in small towns. This Court should resolve whether the general provisions of the McCarran-Ferguson Act may overcome express congressional grants of power to national banks.

3. The decision below also conflicts with this Court's recent holding that the judgment of the Comptroller, who "bears primary responsibility" for regulating the activities of national banks, must be given "controlling weight" where Congress has not spoken directly to an issue. *NationsBank*, 115 S. Ct. at 813-14 (citing *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Comptroller has determined, unlike the court of appeals, that states may *not* curtail insurance powers granted by Congress to national banks:

> A long line of [Comptroller] precedent letters and case law stand for the proposition that national banks derive their powers from federal law, and that state limitations imposed on those powers, to the extent they are in conflict with the federal authorization, are preempted. . . . [I]nsurance activities which are permitted to national banks pursuant to federal law cannot be prohibited by state law.

Letter from William P. Glidden, Office of the Comptroller of the Currency, to John L. Primmer (Feb. 14, 1991) (attached hereto as Appendix A). In addition to conflicting with the text of Section 92, the court of appeals' decision conflicts with, and purports to supplant, the Comptroller's reasoned position on the issue.

III. THIS COURT SHOULD CLARIFY THE STANDARD FOR DETERMINING WHETHER AN ACT OF CONGRESS "SPECIFICALLY RELATES" TO THE BUSINESS OF INSURANCE WITHIN THE MEANING OF SECTION 2(B) OF THE McCARRAN-FERGUSON ACT.

Addressing the ability of the states to prohibit national banks from exercising their powers under Section 92, the Louisiana Court of Appeals recently noted that the "Supreme Court has not been explicit on how specific a [federal] statute must be to preempt a state law which regulates the business of insurance." *First Advantage Ins., Inc. v. Green*, 652 So. 2d 562, 573 (La. Ct. App.), *cert. denied*, 654 So. 2d 331 (La. 1995), *pet. for cert. filed*, Case No. 94-2130 (U.S. Sup. Ct., June 27, 1995). There, the lower state court, echoing the ruling by the appeals court in this case, made the counter-intuitive determination that Section 92, although expressly empowering national banks to sell insurance, does not "specifically relate[] to . . . insurance." The Louisiana Supreme Court thereafter declined to review that ruling. Again, such clearly erroneous, yet infectious, reasoning makes a compelling case for clarification by this Court of the standard under Section 2(b).[12]

[12] This Court's decision in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), did not address the issue because "[t]he parties agree[d] . . . that the federal priority statute does not 'specifically relat[e] to the business of insurance.'" *Id.* at 2208 (third alteration in original). In *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 525 (1993), this Court noted without elaboration that ERISA does specifically relate to the business of insurance. In *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), the majority declined to decide whether Title VII of the Civil Rights Act of 1964 "specifically relate[d]" to the business of insurance and accordingly preempted state law. *Id.* at 1088 n.17. Dissenting, Justice Powell invoked Section 2(b) as a basis for concluding that Title VII did not preempt state insurance regulation. *Id.* at 1099-1103 & nn. 5-6. The present case provides this Court with an opportunity to establish a standard for the proper interpretation of Section 2(b)'s "specifically relates to" provision.

Under a straightforward reading of Section 2(b), Section 92 preempts the conflicting Florida law inasmuch as Section 92 explicitly authorizes insurance sales by national banks and must thereby "specifically relate[] to the business of insurance." In ordinary parlance, "specifically relates" means no more than that the law refers in some explicit sense to or has a connection with that subject. "The ordinary meaning of ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with.'" *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary*); *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) ("in the normal sense of the phrase," the term "relates to" means "has a connection with or reference to") (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983)). Section 92 speaks directly and unambiguously to the business of insurance, and its relation to that business is not "by mere implication." Any such congressional concern embodied in the McCarran-Ferguson Act—*i.e.*, that the federal laws not be construed by mere implication to override state law—has no bearing on this case.

The decision below thus carries the reach of the McCarran-Ferguson Act far beyond what Congress intended, and in a way that would anti-competitively curtail essential authority explicitly vested by Congress in national banks to sell insurance products. This Court should clearly delineate the limits of Section 2(b) with regard to the insurance-related sales activities of national banks.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the petition for a writ of certiorari. The decision below conflicts with those of, *inter alia*, the Sixth Circuit in the *Owensboro National Bank* case and the Eighth Circuit in the *Taylor* case, *see* S. Ct. R. 10.1(a), and presents important questions of federal law that should be settled by this Court, *see* S. Ct. R. 10.1(c).

Respectfully submitted,

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July 7, 1995

APPENDIX

[LOGO]

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

February 14, 1991

John L. Primmer
Primmer and Wilson
12 Prospect Street
P.O. Box 159
St. Johnsbury, VT 05819

Dear Mr. Primmer:

This is in response to your letter of January 18, 1991, requesting confirmation of your understanding that First Brandon National Bank, Brandon, Vermont, a national bank located in a town of under 5,000 population, may engage in insurance agency activities on behalf of fire, life and other insurance companies authorized to do business in the State of Vermont, notwithstanding a state statute which purports to limit the insurance activities of lending institutions (including national banks).

A long line of OCC precedent letters and case law stand for the proposition that national banks derive their powers from federal law, and that state limitations imposed on those powers, to the extent they are in conflict with the federal authorization, are preempted. In addition to the small town insurance agency permission contained in 12 U.S.C. § 92, national banks by federal statute, OCC interpretation and case law are permitted to engage in various credit-related insurance activities (underwriting and selling credit life, health and accident insurance are examples). You specifically mention debt cancellation contracts and the sale of annuities, which have been approved by the OCC for national banks.

I agree with your conclusion that insurance activities which are permitted to national banks pursuant to federal law cannot be prohibited by state law. The most fulsome, recent discussion of this general issue in the insurance business context is contained in OCC Chief Counsel Paul Allan Schott's letter of October 30, 1990, to the Louisiana Insurance Commissioner, cited in your letter. As you will note, the position there stated is that a national bank can engage in small town insurance agency activities pursuant to 12 U.S.C. § 92, notwithstanding state law prohibitions on such activity. The McCarran-Ferguson Act does not authorize a state to bar national banks from conducting insurance agency activities in that state which are authorized by federal law. At most, national banks may be subject to state regulations affecting the way they do the business; they cannot be prohibited, through licensing laws or otherwise, from engaging in the business at all. An example mentioned in the Schott letter of a permissible state regulation is one which limits the amount of premium which may be charged to the consumer. This would not conflict with the national bank's federal authorization to sell the insurance product.

I trust this reply is responsive to your inquiry.

Very truly yours,

/s/ William B. Glidden
WILLIAM B. GLIDDEN
Assistant Director
Legal Advisory Services Division